FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 30 1947
CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 396.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE ROTH,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

MARVIN C. HARRISON,
CRAIG SPANGENBERG,
1500 Guardian Bldg.,
Cleveland, Ohio,
Attorneys for Respondent.

HARRISON, THOMAS, SPANGENBERG & HULL,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 9647

INDEX.

Question Presented 1

Counter Statement of Facts..... 1

Argument 9

Conclusion 12

Appendix 13

AUTHORITIES CITED.

Cases.

Cleveland etc. Ry. Co. v. Dettlebach, 239 U. S. 588, 60 L. Ed. 453 11

Erie R. R. Co. v. Margue, 23 F. 2d 664 (6th Circ.).... 9

R. R. Retirement Board v. Duquesne Warehouse Co., 326 U. S. 446; 90 L. Ed. 192..... 11

Southern R. R. Co. v. Prescott, 240 U. S. 632, 60 L. Ed. 836 11

Statutes.

Federal Employers' Liability Act (Title 45, Sec. 51, U. S. C. A.):

Section 1 .....11, 14

Federal Employers' Liability Act (Title 45, Sec. 55, U. S. C. A.):

Section 5 .....9, 12, 14

Interstate Commerce Act (Title 49, Sec. 1, U. S. C. A.):

Section 1 13

Section 1 (3) (a)..... 10

Interstate Commerce Act (Title 49, Sec. 22, U. S. C. A.):

Section 22 .....3, 10, 13

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 396.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE ROTH,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

QUESTION PRESENTED.

The petitioner has correctly stated the question. Was the respondent, when injured, an "employee" of the Railroad, so as to be entitled to the benefits of the Federal Employers' Liability Act?

COUNTER STATEMENT OF FACTS.

The Statement of Facts in the Brief of Petitioner is not only seriously inadequate but is also in certain respects inaccurate and misleading. We therefore present the following counter statement of facts.

The accident in which respondent suffered bodily injuries (the traumatic enucleation of one eye) took place on the afternoon of August 21, 1945 in a railroad yard at Crestline, Ohio.

This yard was built by, owned by, and operated by the Railroad in order to take care of Government shipments during the war.

The particular operation which was being carried on in this Railroad yard at the time respondent Roth was injured, was under the supervision and complete control of the Railroad.

Counsel for petitioner repeatedly assert in their Statement of Facts that the Railroad, as such, had little if anything to do with the operation of this yard, or the particular job which was being performed when the accident took place. The evidence is exactly to the contrary.

This yard was built by the Railroad at the request of the Government.

On May 7, 1942 (Ex. 3, p. 116) the Railroad sent a letter to the government confirming the fact that it had been

> "agreed that the Pennsylvania should proceed to prepare the storage yards at * * * Crestline, Ohio."

The Government, in the course of prosecuting the war, needed large storage yards where shipments of war material could be held *"in transit"* until there were available the necessary ships at the various ports to receive the material.

The Crestline yard was one of these *"in transit"* storage yards.

On the same day (to wit May 7th, 1942) a formal contract was executed between the Government and the Railroad by the terms of which eight such storage yards were provided for, for such "in transit" service. One of these was the Crestline yard with which we are concerned. This contract is in the Record as Exhibit 4, pp. 117-120.

By the terms of the contract it was provided that

> "heavy motor vehicles, and their equipment and supplies, and other property of the United States Government" could be "shipped in carloads to storage points named herein and there stored in transit."
>
> It was also provided that "Shipments must be consigned in care of the freight agent (of the Railroad) at the storage point * * * Shipments so held in stor-

age may be reconsigned to a final destination, or port of export * * * and readjustment of freight rates to the basis of rates applicable from point of origin to such final destination * * * will be made at the time shipment leaves the storage point."

The contract also required that the Railroad preserve "the identity of lading of each inbound car" while it was stored.

It set out the amount to be paid by the government to the railroad "for transit privilege" "which will be in addition to the transportation charge from point of origin to final destination."

It also set out the various charges for unloading from inbound cars; loading on out bound cars; and the additional rate for storage.

This was the service which the Railroad agreed to perform, upon a basis of charges which the Government agreed to pay.

The contract provided that it was made under authority of Section 22 of the Interstate Commerce Act, which authorizes railroads to make special rates to the Government. (See Appendix.)

A few days after the contract was executed (Ex. 6, p. 125), the Government shipped to the Crestline yard 1000 car loads of boxed Yellow trucks from Pontiac, Michigan, and 1500 car loads of boxed Studebaker trucks from South Bend, Indiana.

There were some supplemental letters and contracts between the Government and the Railroad which are not of great significance, except as they emphasize the fact that it was the *Railroad* (and the Railroad alone) which was dealing with the Government in the creation and operation of this Crestline yard.

For example, the original agreement (Ex. 4, p. 118) made it clear that the government material was to be received by and stored *by the Railroad.*

"When the property has been received in storage by the Railroad Company under this agreement, the Railroad Company, through its station agent, will issue * * *" its receipt for the property etc.

The Railroad agreed with the Government to build this storage yard, and to operate it.

But on March 1, 1944 (Ex. 9, p. 131) the Railroad entered into a contract with a corporation known as the Fritz-Rumer-Cooke Co., by the terms of which the Railroad attempted to delegate to Fritz-Rumer-Cooke Co., the operation of this Crestline yard.

There is nothing in the Record to indicate that the Government ever knew, or ever consented to this attempted delegation.

This contract between the Railroad and the Fritz-Rumer-Cooke Co. was on the basis of "*cost-plus,*" so called.

Almost every conceivable charge or expense was included in the bill which was sent to the Railroad, and the Railroad then reimbursed the Fritz-Rumer-Cooke Co. for all these expenses plus "a fee of 5% on * * * payroll cost of labor, a fee of 2½% on hire of trucks * * * a fee of 5% on the hire of all other equipment * * * and a fee of 8% on the net cost of materials purchased * * *"

The respondent, George Roth, was, in name, an employee and on the payroll of this contractor, Fritz-Rumer-Cooke Co.

What are the facts about the actual operation of this Crestline yard?

The brief of petitioner asserts that the entire operation was turned over to Fritz-Rumer-Cooke Company.

In the sense that Fritz-Rumer-Cooke Company acted as the Railroad's *agent* for the operation, that is true.

In the sense that the Railroad withdrew from all control and right of control, it is entirely incorrect.

The yard was on Railroad premises. (p. 18)

It was physically connected with the Railroad lines. This appears from the map, which was prepared by the Railroad (p. 161). The map bears this legend:

THE PENNSYLVANIA RAILROAD COMPANY

Western Region — Fort Wayne Division
P.F.W. & C. Ry. — Val. Sec. 3—Ohio

CRESTLINE, OHIO

FACILITIES FOR STORAGE OF FEDERAL EQUIPMENT

No person could enter the storage yard except by virtue of a pass which was issued by the Railroad. (p. 62.) This pass had to be surrendered every night to a Railroad officer, and secured each morning from the Railroad officer. (62.) Respondent was issued one of these passes by the Railroad, so that he could enter and work in the yard. (Ex. 25, p. 153.)

The Railroad agreed to provide a certain number of patrol officers to guard the entire yard. (See letters of May 19, 1942 and May 20, 1942, Exhibits 6 and 7, pp. 125, 127; and also contract of April 14, 1943, Ex. 8, p, 127.) The Railroad engines and crews moved in and out of the yard. (pp. 25, 77.)

Furthermore, the actual work which respondent was doing at the time he was hurt, was under the specific control of the respondent.

The accident came about in this manner.

When the European war was over, the Railroad exercised its rights to terminate its contract with Fritz-Rumer Cooke Co., and the latter was accordingly engaged in finishing its work, at the time of the accident. Some of the heavy machinery was being loaded upon a railroad car, and was being lashed securely for shipment.

To hold this machinery down upon the flat car, cables were used in a fashion that is generally known as the Spanish turnbuckle. That is, a length of steel cable was run through a stakeholder pocket on the side of the flat car,

run up through an opening in the machinery and then looped back upon itself. Two ends of the cable were clamped together so that the cable would then form a continuous loop. An iron bar was then inserted in a small loop of this cable and was turned until by the process of twisting, the cable was brought into terrific tension. When the cable could not be turned tighter, the men who were holding the twisting bar were ordered to force the end of the bar between two timbers which were spiked to the bed of the car. The men were then told that the job was completed. The bar, however, was insecure. A few moments later, it slipped out of its socket, and being under great tension, spun around and one end struck the plaintiff under the left eye, tearing the eye out of its socket.

The Record shows plainly that this whole process was supervised and controlled *by the Railroad.*

John F. Blancett, who was a car inspector for the Railroad, testified that he had the right "to direct the manner in which they (the Fritz-Rumer Cooke Co. employees) load" the cars (p. 28); that the Railroad agents received all orders for the unloading or reshipment of freight from the yard (pp. 28, 29); that the Railroad guards patrolled the yard, and maintained a guardhouse at each corner of the yard (p. 29), that he (Blancett) examined every empty freight car coming to the yard, to determine whether it was suitable to be used; and after it had been loaded, he checked every car to see if the load "was properly staked and affixed to the car." (p. 30.)

The Railroad provided the *lights* in the yard, and a Railroad man was in charge of the *water supply and the fire hydrants.* (p. 33.)

When the accident happened to respondent, Blancett (this Railroad inspector) was engaged in supervising the job.

When the men had tightened the loop of cable sufficiently, he admitted, "I told them that was enough." (p. 32.)

"Q. When they had the cable twisted so that it was taut, you said, 'That's tight enough' and then they were going to pull the end of the bar and lash the end of the bar so the table could not untwist?

A. That is right." (p. 34.)

To the same effect see testimony of Respondent. He testified that Blancett gave orders as to "how" the machinery was to be loaded. (p. 63.)

"Q. • • • Who told you how to load that crane?

A. Mr. Blancett.

• • • • •

Q. • • • Who told you to get the cable and twist the cable?

A. Blancett.

• • • • •

Q. Who decided when that cable had been twisted tight enough?

A. John Blancett • • •.

• • • • •

Q. • • • What did he say?

A. • • • He said 'Well, that is all. Leave it there. That is good enough.' " (p. 64.)

When the case was concluded, the District Court (in the absence of the jury) made this observation about the manner in which the Railroad had this work done.

"I personally think it was a very negligent way of loading that crane. If I were sitting on the jury, I certainly would think it was an antiquated, negligent manner of loading the crane." (97.)

It is obvious, therefore, that plaintiff would have had a right to recover, quite irrespective of the Federal Employers' Liability Act.

Even if he had been only an invitee he could have recovered because of the negligence of Blancett, the Railroad's inspector whose negligence resulted in the injuries to respondent.

At any rate, the iron bar, which was used at the Railroad's orders, and used in the manner dictated by the Railroad, spun around and injured the respondent.

Respondent filed an action against the Railroad, and set up two separate and alternative causes of action.

As the first cause of action, he alleged that he was in fact an employee of the Railroad even though in name, an employee of Fritz Rumer Cooke Co., and that he was therefore entitled to the benefits of the Federal Employers' Liability Act.

As his second cause of action he alleged that if, in fact, he was not an employee of the Railroad, he was an invitee upon the premises of the Railroad, and was entitled to recover because of the negligence of the Railroad, which through its agent Blancett, had supervised the loading of the machinery, and had negligently ordered the job done in the very manner which resulted in the serious injury to respondent.

At the trial, the District Judge held that under the undisputed facts respondent was an employee of the Railroad, and submitted the case to the jury only upon the first cause of action.

There was a general verdict for respondent.

Motions for New Trial, and for Judgment notwithstanding the verdict were filed, and overruled.

Upon appeal to the Sixth Circuit Court of Appeals, the judgment was affirmed.

The Opinion is reported in 163 F. 2d 161 (Advance sheets for October 6, 1947).

ARGUMENT.

The central proposition of the petitioner, which is repeated many times, and on which it predicates its claim for certiorari, is that

> "The decision of the Circuit Court of Appeals establishes a potential and wholly unexpected liability under that Act (the Federal Employers' Liability Act) on the part of the railroads of this country, * * * to an incalculable number of employees of shippers who load carload freight." (Their Brief, p. 4.)
>
> "The loading of carload freight is a function not of the railroad but of the shipper." (Their Brief, p. 8.)

Petitioner entirely misconceives the problem with which the lower courts were dealing in this case; and therefore has argued a case which is not presented by the record.

The respondent has never claimed—and neither of the lower courts has held—that an ordinary shipper while loading railroad cars, can bring his employees under the protection of the Federal Employers' Liability Act.

In our case at bar, we are dealing with a very different situation.

We are dealing with a *Railroad* which received goods *in transit,* as a *Railroad,* stored them as a *Railroad,* and eventually sent them forward to their ultimate destination as a *Railroad.*

We assume that it is elementary that a Railroad can not delegate away any of its essential functions *as a Railroad* to an independent contractor, and thus escape the obligations of the Federal Employers' Liability Act.

That is what is clearly provided in Section 5 of the Federal Employers' Liability Act. (Title 45, Sec. 55, U. S. C. A.) (See Appendix.)

May a Railroad for example delegate to an independent contractor, the repair of its right of way and thus deprive the men doing that work of their rights under the Act? In *Erie R. R. Co. v. Margue* (23 F. 2d 664—6th Circ.),

it was held that despite such attempted delegation, the workmen were still entitled to the benefits of the Act.

Was the work which was attempted to be delegated to the Fritz-Rumer-Cooke Co. an essential part of the petitioner's work *as a Railroad?*

The documents which are in evidence do not permit of any doubt on that point.

For example the original contract between the Government and the Railroad provided that when the goods were received and stored *in transit* and subsequently sent on to the port of final destination, the Government could only be charged for the entire haul, a rate equal to the amount which could be charged from the point of original shipment, to the point of final destination.

In other words, if the goods came from A to Crestline where they were stored in transit, and then were sent on to B as the port of final destination, the Railroad could only charge the through rate from A to B, and not the sum of the two separate rates for the two separate hauls from A to Crestline, and Crestline to B. This is specifically set out in paragraph 3 of the original contract, p. 117.

Furthermore, counsel for petitioner seem to overlook the fact that *storage* is one of the essential services performed by a railroad.

This is pointed out very clearly in the Interstate Commerce Act.

All of the contracts emphasize the fact that they are made subject to Section 22 of that Act, which permits special rates to the Government.

In Section 1 (3) (a) of the Interstate Commerce Act (Title 49, Sec. 1, U. S. C. A.) the definitions emphasize the point which we are discussing:

> "The term *'railroad'* as used in this chapter *shall include* * * * all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property desig-

nated herein, including *all freight depots, yards, and grounds, used* or necessary *in the transportation* or delivery *of any such property.*

The term 'transportation' as used in this chapter *shall include* * * * *all instrumentalities and facilities* of shipment or carriage, irrespective of ownership or of any contract express or implied, for the use thereof, *and all services in connection with* the receipt, delivery, elevation, and *transfer in transit,* ventilation, refrigeration or icing, **storage,** and handling of *property transported."* (Emphasis ours.)

This section has been considered repeatedly by the Supreme Court of the United States, and the services of a railroad in furnishing *"storage"* has been held to be a part of *"transportation."* See, for example, *Cleveland etc. Ry. Co. v. Dettlebach,* 239 U. S. 588, 60 L. Ed. 453; *Southern R. R. Co. v. Prescott,* 240 U. S. 632, 60 L. Ed. 836; *R. R. Retirement Board v. Duquesne Warehouse Co.,* 326 U. S. 446; 90 L. Ed. 192.

In addition to the foregoing, we call attention to the 1939 Amendment of the Federal Employers' Liability Act.

Whatever might have been the case before that Amendment, we submit that the language of that amendment is so broad that the work which respondent was hired to do in the storage yard, was clearly part of the Railroad's work, and within the protection of the Act.

"* * * Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Title 45, sec. 51, U. S. C. A.)

CONCLUSION.

The respondent has suffered severe injuries as the direct result of the negligence of the Railroad.

At the time he was injured, he was engaged as a workman in a railroad yard where goods were received, stored in transit, and reconsigned to their final destination. This was (we submit) "railroad" work.

The contract with the socalled independent contractor was a transparent device to avoid the obligations of the Federal Employers' Liability Act. This was prohibited under Section 5 of that Act.

The decisions of the lower courts are clearly correct, and we submit that the petition for certiorari should be denied.

Respectfully submitted,

MARVIN C. HARRISON,
CRAIG SPANGENBERG,
Attorneys for Respondent.

HARRISON, THOMAS, SPANGENBERG & HULL,
Of Counsel.

APPENDIX.

Section 22 of The Interstate Commerce Act.

(Title 49, Sec. 22, U. S. C. A.)

"Sec. 22. Nothing in this chapter shall prevent the carriage, *storage,* or handling of property free or at reduced rates for the United States * * *." (Emphasis ours.)

Section 1 of The Interstate Commerce Act.

(Title 49, Sec. 1, U. S. C. A.)

"Sec. 1. (1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of * * * property wholly by railroad, or partly by railroad and partly by water when both are used under a common control * * * etc.

* * * * *

(3) Definitions. The term 'common carrier' * * * shall include * * * all persons * * * engaged in such transportation * * * as common carriers for hire * * *.

The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

The Federal Employers' Liability Act.

"Sec. 1. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of the next of kin depending upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its car, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Title 45, Sec. 51, U. S. C. A.)

* * * * *

"Sec. 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." (Title 45, Sec. 55, U. S. C. A.)